VERNER · LIIPFERT
BERNHARD · McPHERSON AND HAND
CHARTERED

901 - 15TH STREET, N.W.
WASHINGTON, D.C. 20005-2301
(202) 371-6000
FAX: (202) 371-6279

WRITER'S DIRECT DIAL
(202) 371-6206

ORIGINAL

RECEIVED
JUL [illegible] 1997

DOCKET FILE COPY ORIGINAL

July 23, 1997

BY HAND

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Comments of Ameritech New Media, Inc. in CS Docket No. 97-141

Dear Mr. Caton:

Enclosed please find the original and nine copies of the Comments of Ameritech New Media, Inc. In the Matter of Notice of Inquiry Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming in CS Docket No. 97-141.

Please direct any questions that you may have to the undersigned.

Respectfully submitted,

Lawrence R. Sidman

Lawrence R. Sidman

Enclosures

No. of Copies rec'd 0+8
List ABCDE

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

JUL 23 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of Notice of Inquiry Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming	)	CS Docket No. 97-141

COMMENTS OF
AMERITECH NEW MEDIA, INC.

Deborah H. Morris
Ameritech New Media, Inc.
300 South Riverside Plaza
Suite 1800
Chicago, IL 60606
(312) 526-8062

Lawrence R. Sidman
Jessica A. Wallace
Verner, Liipfert, Bernhard,
McPherson & Hand, Chtd.
901 - 15th Street, N.W.
Suite 700
Washington, D.C. 20005
(202) 371-6000

Counsel for Ameritech New Media, Inc.

July 23, 1997

TABLE OF CONTENTS

Page

I. INTRODUCTION AND SUMMARY 1

II. AMERITECH HAS CONTRIBUTED SUBSTANTIALLY TO THE CREATION OF A MORE COMPETITIVE MVPD MARKETPLACE 8

III. DIFFICULTIES ENCOUNTERED BY AMERITECH IN BECOMING A COMPETITIVE PROVIDER OF CABLE SERVICE. 13

A. Access To Quality Cable Programming Continues To Be A Challenge And Exclusive Programming Contracts Remain The Enemy Of Developing Competition. . . . 14

1. Program Access Problems Not Covered By The 1992 Cable Act 14

a. Exclusive Contracts Involving Non-vertically Integrated Cable Programmers 14

b. Non-Satellite Delivered Programming . . 18

c. Discrimination Against Wireline Competitors To Incumbent Cable Operators 19

2. Shortcomings In The Commission's Rules For Processing Complaints And Providing Remedies For Section 628 Violations 20

a. The Commission Fails To Handle Program Access Complaints In An Expeditious Fashion As Required By Law. 21

b. Prospective Competitors In The Video Marketplace Find It Extremely Difficult To Obtain Rate Information From Programmers To Prove Discrimination. 24

c. The Commission Has Declined To Impose Fines Or Damages For Violations Of Section 628. 24

IV. MULTIPLE DWELLING UNITS POSE SIGNIFICANT CHALLENGES TO COMPETING CABLE PROVIDERS BECAUSE OF EXCLUSIVE CONTRACTS BETWEEN INCUMBENT CABLE OPERATORS AND BUILDING OWNERS AND UNDULY RESTRICTIVE CABLE INSIDE WIRING RULES . . . 28

TABLE OF CONTENTS

Page

A. Exclusive Contracts Between Incumbent Cable Operators And Building Owners 29

B. Inside Wiring 31

V. TO AVOID IMPERMISSIBLE DISPARATE REGULATORY TREATMENT IN THE VIDEO PROGRAMMING MARKET, THE COMMISSION SHOULD CLARIFY THAT CERTAIN SMATV PROVIDERS FALL WITHIN THE STATUTORY CLASSIFICATION OF CABLE OPERATORS, AND, THEREFORE, MUST OBTAIN CABLE FRANCHISES IN ORDER TO LAWFULLY PROVIDE CABLE SERVICES. 34

VI. RECENT CONSOLIDATION TRENDS IN THE MVPD MARKET MUST BE SCRUTINIZED CLOSELY BY THE CONGRESS AND REGULATORY AGENCIES 37

VII. INEQUITIES IN THE LEASED ACCESS RULES MUST BE ADDRESSED TO HELP ENSURE COMPETITION BLOSSOMS 40

VIII. CONCLUSION 41

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Notice of Inquiry Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming	)	CS Docket No. 97-141

COMMENTS OF
AMERITECH NEW MEDIA, INC.

I. INTRODUCTION AND SUMMARY.

In the past five years, consumer outrage at skyrocketing cable prices and poor service offered by unresponsive, incumbent cable operators impelled Congress to take two extraordinarily significant steps in an effort to create competition in the multichannel video programming distribution ["MVPD"] marketplace. First, Congress enacted Section 628 of the 1992 Cable Act, prohibiting unfair or discriminatory practices in the sale of satellite cable and satellite broadcast programming.[1/] Secondly, Congress passed Section 651 of the Telecommunications

1/ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 19, 106 Stat. 1460, 1494 (1992) ("1992 Cable Act"); 47 U.S.C. § 548(b).

Act of 1996 ["the 1996 Act"], repealing the arcane telephone company cable cross-ownership prohibition.[2/]

Ameritech New Media, Inc. ("Ameritech") has responded vigorously to Congress' welcome initiatives. Since its launch in May, 1996, Ameritech has secured forty-seven (47) franchises and is currently offering cable services, over state of the art cable systems, to consumers in twenty-eight (28) communities with an aggregate population of roughly two million people residing in more than 930,000 households in the states of Illinois, Ohio and Michigan.[3/] In these communities, incumbent cable operators have responded to Ameritech's competitive presence precisely as Congress would have hoped: they are refraining from increasing prices and, in some instances, actually dropping prices, and increasing programming options for subscribers.[4/] Such experiences are in marked contrast to those in adjacent communities not yet served by Ameritech where price hikes and poor service remain the order of the day. They are also markedly different than the national trend of sharply rising cable rates,

---

2/ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

3/ A list of Ameritech's franchises is appended as Attachment 1.

4/ These competitive responses are described in detail in Section II of these Comments and in the chart appended as Attachment 2.

recently determined to be exceeding the rate of inflation by more than 3 to 1.[5/]

Ameritech's brief but intense experience as a head-to-head competitor to incumbent cable operators vividly illustrates why the status quo in the MVPD market is unacceptable to many Members of Congress and the public.[6/] Consumers benefit directly and tangibly from competition, and they are shortchanged where competition is thwarted.

There is good news and bad news regarding the status of competition in the MVPD market. The bad news is that there remain significant structural barriers to competition, as well as harmful, anticompetitive conduct by incumbent cable operators and cable programmers. The good news is that there are a number of concrete measures which the Congress and the Commission could

---

5/ The Bureau of Labor Statistics recently released data that showed for the 12 months ending June 30, 1997, cable rates were up 8.1% v. 2.3% growth in the Consumer Price Index. Bureau of Labor Statistics, Consumer Price Index Summary: June 1997 (last modified July 15, 1997). <http://stats.bls.gov/news.release/chi.nws.htm>

6/ "In sum, I remain concerned that competition in the multichannel video market today is not as vigorous as it will have to be to effectively constrain cable rates. Today, I hope to gain an insight on what must be done to assure that competition will measure up to the task by 1999." Hearing on Multichannel Video Competition Before the Senate Committee on Commerce, Science, and Transportation, 105th Cong. 1st Sess. (April 10, 1997) (statement of Senator John McCain, Chairman (R-AZ)). In addition, House Telecommunications Subcommittee Chairman Billy Tauzin (R-LA) recently announced his intention to hold a hearing on the status of competition in the video market on July 29, 1997. See, John Mercurio, Big Cable Company Cuts Deal to Carry C-Span. The Network of Congress, Battered by Supreme Court Decision, Wins 100% Coverage on TCI, Roll Call, May 5, 1997.

proactively take to enhance the development of competition and rectify remaining abuses.

Despite the enactment of Section 628, there remain significant impediments to obtaining access to absolutely essential popular quality programming, particularly sports programming, at nondiscriminatory rates and on nondiscriminatory terms and conditions. Today, as it was when the 1992 Cable act was passed, access to programming is the key to competition. Consumers expect that certain "core" programming, e.g., CNN, ESPN, HBO, regional sports, etc. will be offered to them by any MVPD seeking to serve them. Differentiation is to be achieved by packaging, value, features and pricing, not by content.

In a noncompetitive market, exclusive programming contracts and similar arrangements are the enemies of competition.[7/] Yet, recent changes in the MVPD marketplace mean more of these arrangements are escaping the coverage of Section 628. For example, Viacom, which had been a vertically integrated cable company at the time of the 1992 Cable Act, spun off its cable systems and now is entering into exclusive programming contracts which would be prohibited had Viacom remained vertically integrated. Similarly, major broadcast networks, such as Fox and

---

7/ "The Committee believes that exclusivity can be a legitimate business strategy where there is effective competition. Where there is no effective competition, however, exclusive arrangements may tend to establish a barrier to entry and inhibit the development of competition in the market." Senate Commerce Committee Report accompanying S. 12, the "Cable Television Consumer Protection Act of 1992," S. Rep. No. 102-92, at 32 (1992) ("Senate Commerce Committee Report").

NBC, are becoming increasingly important content providers to cable operators but are not covered by Section 628 because they do not operate cable systems. The reticence of non-vertically integrated cable programmers to admit in writing that they have exclusive contracts with incumbent cable operators is evidence of the sensitivity of this issue.

In a similar vein, Section 628 fails to protect against anticompetitive conduct involving programming transmitted by fiber optic wire or by any means other than satellite delivery. As described below, reports and media articles of cable operators, such as Cablevision and Comcast, switching to fiber optic delivery of programming, suggest that the protections created by Section 628 need to be updated. It is absurd that anticompetitive conduct which would unquestionably violate Section 628 if the programming were delivered by satellite would be permissible as long as the programming were delivered by fiber. Again, a change in the marketplace, this time a technological change, is demanding a regulatory response to maintain the procompetitive force of Section 628. Congress or the Commission can and should address these problems now rather than wait for these trends to accelerate and erode the competitive forces in the MVPD marketplace. Prompt and meaningful reforms in these areas would give competition a needed boost.

Complementary changes to the FCC's program access complaint procedures and remedies implementing Section 628 also are needed to bring the Commission's rules into alignment with the intended competitive thrust of Section 628. The program access complaint process is not conducted in as expeditious manner as mandated; does not provide a right to discovery needed to obtain relevant information essential to proving a discriminatory pricing or practices case; and does not impose economic disincentives in the form of fines or damages for violations of Section 628. These flaws in the Commission's procedures combine to deter vigorous prosecution of Section 628 complaints and actually create business incentives that reward anticompetitive behavior, thus undermining the substantive protections conferred by Section 628. Ameritech has filed a Petition for Rulemaking to ameliorate these problems.[8/] The Commission's issuance of a Notice of Proposed Rulemaking in response to the Petition and swift adoption of the proposed rules changes would create an immediate improvement in the competitive environment.

The multiple dwelling unit ("MDU") marketplace also is strewn with barriers to competition and, therefore, is more difficult to penetrate. Approximately thirty-two percent of all Americans live in MDUs,[9/] the overwhelming majority residing in rental units. In terms of sheer numbers, a competing cable operator's access to the MDU population is critical to its

---

8/ See Ameritech New Media Inc.'s Petition for Rulemaking to Amend 47 C.F.R. § 76.1003 -- Procedures for Adjudicating Program Access Complaints, filed May 16, 1997, RM No. 9097 (hereinafter referred to as "Petition for Rulemaking").

9/ Our Nation's Housing in 1993, U.S. Dept. of Commerce, Bureau of the Census.

prospects for success. Yet, exclusive contracts between incumbent cable operators and building owners and anticompetitive inside wiring rules deprive MDU residents of competitive choices among MVPDs. The Commission can exercise jurisdiction under Section 628 over some of these practices and can adopt rules changes in its pending rulemaking proceeding on cable inside wiring to boost competition.[10/]

While less structurally important than access to programming on nondiscriminatory prices, terms and conditions and access to MDUs, Ameritech believes competition also is being undermined by the potential for impermissible disparate regulatory treatment in the MVPD market of certain SMATV providers seeking to be insulated from regulatory oversight and by leased access rules which place competitors at a disadvantage with incumbent cable operators. The Commission can and should take appropriate action to ensure that a SMATV operator in fact functioning as a cable operator be regulated as a cable operator, subject to franchise requirements. The leased access rules also should be modified to create a more level playing field for competitive cable operators, especially new entrants.

Finally, Ameritech is very concerned about the adverse impact certain announced mergers and joint ventures, involving some of the most powerful cable operators and programmers, will

---

10/ *See* In the Matter of Telecommunications Services Inside Wiring, Customer Premises Equipment, CS Docket No. 95-184, *Notice of Proposed Rulemaking*, 11 FCC Rcd. 2747 (released January 26, 1996).

have on aspiring competitors and the MVPD market. Intense regulatory scrutiny of these deals is vital to ensure adequate safeguards exist to protect competition in the MVPD market.

Entrepreneurial companies, like Ameritech, applaud the past efforts of Congress and the Commission in their attempts to inject genuine competition in the MVPD marketplace and urge that they continue to serve as enablers of competition.

II. AMERITECH HAS CONTRIBUTED SUBSTANTIALLY TO THE CREATION OF A MORE COMPETITIVE MVPD MARKETPLACE.

When Congress enacted the Telecommunications Act of 1996, it intended to break down arcane barriers to entry in the telecommunications market. In particular, Section 651 repealed the telephone company-cable cross ownership restrictions and invited wireline telephone companies to offer consumers real choice in the video market. Section 651 is the impetus for the tangible consumer benefits flowing from Ameritech's entry into the video marketplace.

Ameritech, operating as a cable operator subject to regulation under Title VI of the Communications Act of 1934, has undertaken the task of providing head-to-head, robust competition to incumbent cable operators, enabling consumers to enjoy genuine competition and its resultant dividends. Ameritech is currently building out state of the art cable systems in Illinois, Ohio and Michigan; has obtained forty-seven (47) franchises from municipal authorities to serve communities having a total population of more than two million people; and already is actually offering americast™ Cable TV service to consumers in twenty-eight (28) of these communities in the Chicago, Detroit, Cleveland and Columbus areas.[11/] In communities where Ameritech offers an alternative to incumbent cable service, the video landscape is strikingly improved. The strategic behavior of incumbent cable operators in their response to Ameritech's presence has been all encompassing: better programming, superior technical performance, lower costs and increased consumer service.[12/]

Ameritech's presence has spurred incumbent cable operators in towns across the States of Michigan, Illinois, and Ohio where Ameritech offers genuine choice in service, to implement a number of changes that benefit consumers. They have upgraded their networks; lowered prices; pledged to "meet or beat" any offer from a wired cable provider for similar services; launched "win-back" campaigns; added channels;[13/] offered free cable channels; rolled out upgraded converter boxes with an Interactive Programming Guide (IPG); offered discounts; and added quality channels to their expanded basic tiers. However, these changes do not reflect a new mindset among all incumbent cable operators; instead, they are selective changes in targeted communities instituted to combat the competition provided by Ameritech.

11/ See Attachment 1.

12/ See Attachment 2; see also Hugh McDiarmid Jr., Ameritech Wants to Vie for Cable TV, Detroit Free Press, June 16, 1997 at B2.

13/ Ameritech offers 80-90 channels, while National Cable Television Association reports that the average cable system has 53 channels.

For example, Jones Intercable recently raised rates for basic cable from $23.99 to $25.49 in Aurora, Illinois where Ameritech does not provide service, while it held its rates constant at $23.87 in neighboring Naperville, Illinois, coincidentally, where Ameritech does compete. In addition to maintaining its rates in Naperville, Jones Intercable offered various "sweeteners" to entice subscribers, including offering the Disney Channel among its basic cable channels; implementing a new cycle billing program to improve customer service; and airing four new channels - Home and Garden, The Learning Channel, The Sci-fi Channel and Animal Planet.

In addition, other incumbent cable operators have responded to competition in even more dramatic fashion. For example, in Berea and North Olmsted, Ohio, Cablevision Systems, Inc. responded to Ameritech's entry into the market by upgrading its cable system to 750 MHz; adding twenty new channels (nineteen of which were added to the basic tier) increasing the total number of channels to 77; offering the new expanded basic tier channels free to subscribers for the first six months; introducing a new advanced converter box with an Interactive Programming Guide; moving The Disney Channel from a la carte premium service to its expanded basic tier, saving customers who subscribed to The Disney Channel over $10 per month; decreasing prices for its a la carte premium service from $11.00 to between $6.95 to $9.95; and offering the recent Tyson-Holyfield boxing match for free ($49.95 value). Upon expiration of the six month free introduction of the new channels, Cablevision maintained its price for its expanded basic tier in both communities, resulting in a $2.57 per month savings for the additional channels. Subscribers in neighboring communities where Ameritech does not compete have not experienced similar benefits and savings.

In areas in the Detroit metropolitan area where Ameritech competes with Comcast, Comcast has responded by upgrading its system to 750 MHz; adding up to forty channels in some franchise areas; introducing a new advanced converter box with Interactive Programming Guide capability; moving The Disney Channel and PASS (a regional sports programming channel) from premium services to the expanded basic tier; introducing a promotion called Club Comcast with guaranteed rates for one year and a $3 per month discount off the expanded basic tier standard rate; pledging to meet or beat any offer from another wired cable operator; and offering HBO free for an entire year ($12.95 per month value). In Comcast's Garden City, Michigan franchise area, for example, it increased the number of expanded basic tier channels from forty-seven to sixty-six while increasing the monthly price by only $.91. Because of the addition of channels to the expanded basic tier, this slight increase in price actually amounts to a per-channel <u>decrease</u> of $.12. In Southgate, Michigan, Comcast added sixteen channels to its expanded basic tier and only raised its monthly price for the tier by $.62, resulting in a per-channel <u>decrease</u> of $.10.

Time Warner, the incumbent operator serving Wayne, Michigan has responded to Ameritech's entry into the market by upgrading its cable system to 750 MHz; adding seventeen channels increasing the total number of channels to 78; moving The Disney Channel and PASS from premium services to their expanded basic tier; lowering the price for expanded basic tier, premium channels, and converters and remote control devices ($.42/month savings); offering a subscriber retention program featuring either half prices in the first and seventh month and a free thirteenth month of subscription to their cable service, or subscription to Cinemax (a premium movie service) for one year at no cost. Despite adding eleven channels to the expanded basic tier, Time Warner decreased its rate for the tier by $1.14 per month. In addition, Time Warner lowered the cost of its remote control device and converter by $.42 per month. Total savings to a Time Warner customer in Wayne, Michigan who receives, for example, the expanded basic tier and two premium services and PASS is as much as $20 per month, or $240 per year. These are but a few of the rather telling examples of the responses of the incumbent cable operators in the face of competition.

These favorable competitive responses, however, contrast significantly with the experiences in communities where competition is essentially nonexistent. Those communities continue to experience steep cable rate increases without corresponding increases in either customer service or in programming options for subscribers.[14] Decker Anstrom, President of the National Cable Television Association, recognizes the perils of this situation: "We're inviting serious political problems with double-digit price increases."[15] Extrapolating from Ameritech's experience, it appears that, at least for now, the ability of a consumer to enjoy more value and better quality in cable service is directly dependent upon whether or not the consumer is fortuitous enough to live in an area where there is meaningful competition to the incumbent cable operator.

III. DIFFICULTIES ENCOUNTERED BY AMERITECH IN BECOMING A COMPETITIVE PROVIDER OF CABLE SERVICE.

When Congress amended the Communications Act of 1934 by enacting the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), it incorporated Section 628 to prohibit unfair or discriminatory practices in the sale of satellite cable and satellite broadcast programming.[16] Congress believed that Section 628 would be the elixir to the programming problems of prospective competitors and would ignite competition to incumbent cable providers and thus provide consumers with genuine choice in viewing options by mandating

---

14/ See, e.g., Manuel Perez-Rivas, Cable Rates Not a Hit in Montgomery, Washington Post, May 22, 1997, at A1; Cable: Paying Green, Seeing Red, Washington Post, May 4, 1997, at A22.

15/ Marianne Paskowski, Cable's Game of Chicken, Multichannel News, May 26, 1997 at 56. The article is appended as Attachment 3.

16/ 47 U.S.C. §548(b).

access to programming. Unfortunately, as is illustrated below, despite the intentions of Congress and the implementation by the FCC, Section 628 does not adequately address the substantial competitive problems being faced by MVPDs in today's changing video marketplace.

A. Access To Quality Cable Programming Continues To Be A Challenge And Exclusive Programming Contracts Remain The Enemy Of Developing Competition.

1. Program Access Problems Not Covered By The 1992 Cable Act.

a. Exclusive Contracts Involving Non-vertically Integrated Cable Programmers.

In 1992, the vast majority of the most popular cable programming was owned by vertically integrated cable companies.[17/] Consequently, Congress was chiefly concerned with the amount of cable programming tied up in exclusive contracts or other arrangements involving vertically integrated cable companies and crafted Section 628 specifically to address this concern.

In contrast to 1992's MVPD market, in 1997, anticompetitive trends tend not to center solely around vertically integrated cable operators and cable programmers. Rather, it appears that a growing number of significant cable programmers tying up quality programming in exclusive contracts are not affiliated with cable operators or have recently sold their cable operations and, therefore, fall outside the Section 628 prohibitions despite the

17/ See Senate Commerce Committee Report, at 25. The most notable exceptions were ESPN, then owned by Capital Cities/ABC; and The Disney Channel, owned by the Disney Company.

obvious adverse impact such exclusive agreements have on competition in the video market.

A classic example of this development is Viacom which owns MTV, Nickelodeon, and Nick-at-Night, among other cable networks. Viacom, formerly a vertically integrated cable company, has spun off its cable system holdings and now, despite its considerable market influence, is exempt from the prohibitions contained in Section 628. Viacom recently launched the cable channel, TV-Land, after significant promotions on Viacom networks, including Nick-At-Night and MTV.[18/] Ameritech believes that Coaxial Cable and Cox Cable have exclusive agreements with Viacom for TV-Land in their service areas, thus denying Ameritech access to that programming in Columbus and Fairview Park, Ohio. In fact, Cox advertises in a direct advertising campaign aimed at Ameritech that it is the only cable operator carrying TV-Land.[19/] Based upon Ameritech's discussions with Viacom, it is reasonable to infer that there are exclusive contracts for that service which would preclude Ameritech from carrying TV-Land in certain communities it serves.

In 1992, the major broadcast networks, with the exception of ABC which had an eighty percent interest in ESPN, were not

---

18/ New Networks Will Face A Harsh Climate in 1996, CableWorld, November 27, 1995, at 142.

19/ See Cox Communications advertisement appended hereto as Attachment 4. See also, Optel, Inc. Reply Comments in the Matter of the Third Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming in CS Docket No. 96-133 ("Third Annual Report").

heavily involved in cable programming. Today, with TV viewership and advertising revenues increasingly moving from broadcasting to cable, they are more aggressive participants in cable programming. NewsCorp, the parent of Fox, owns many regional sports networks, FX, the Fox News Channel and has recently announced a deal to purchase the Family Channel and to acquire, together with TCI, a significant interest in Rainbow's regional sports networks. NBC owns CNBC and, together with Microsoft, MSNBC. CBS, which had been the last of the major broadcast networks to enter into cable programming, has significant ownership interests in TNN and CMT and has launched its own cable network, Eye on People. Since none of these broadcast networks own cable systems, their cable programming networks are not subject to the Section 628 prohibitions.

In fact, it appears as though many, if not all, of these major cable programmers have or are offering exclusive contracts to incumbent cable providers. For example, Bartholdi Cable asserted in its antitrust complaint against Time Warner that in 1994, Fox, then the sole owner of FX, was coerced by TCI into granting not only TCI, but every franchised cable TV system in the United States, the exclusive right to distribute FX within its service area.[20/] In October of 1996, it was widely reported that Fox News Channel offered distributors carriage on an exclusive basis (terrestrial and wireless) for five years within

---

20/ See, Second Amended Complaint filed in Bartholdi Cable Co. v. Time Warner, Inc., Civ. No. 96-2687, at para. 98 (E.D.N.Y. filed December 13, 1996).

their franchise areas. Fox News Channel purportedly offered to pay a one-time fee between $10 and $12 per subscriber. The Wireless Cable Association International also has described refusals to provide service to its members by FX and Fox News.[21/] More recently, in 1997, CBS announced its intention that Eye on People "will be available to cable operators on a terrestrial-exclusive basis, which means that it will be available to satellite services but not to telephone or wireless distributors that compete with cable operators."[22/] Similar concerns regarding exclusive programming contracts exist with MSNBC.

The growing importance to cable operators of exclusive contracts with non-vertically integrated cable programmers was recently highlighted in the Petition of Outdoor Life Network and Speedvision Network for Public Interest Determination under 47 C.F.R. § 76.1002(c)(4), CSR No. 5044-P (filed July 15, 1997). In their Petition, these two vertically integrated cable programmers seek the right to enter into exclusive contracts with cable operators, complaining bitterly that their inability to do so under Section 628 has put them at a severe competitive disadvantage and threatens their viability:

> Time and time again, cable operators who were ready to affiliate with the networks, or to substantially increase the number of systems

---

21/ Wireless Cable Association International, Inc., Comments in Petition for Rulemaking, at 7.

22/ See, Programming Briefs, Multichannel News, January 13, 1997, at 30, appended hereto as Attachment 5.

> on which they carry the networks, have chosen instead to carry other, often lesser quality networks that were able to provide exclusivity.

Id. at 2.

The adverse impact on competing cable providers, such as Ameritech, of not being able to acquire a substantial amount of cable programming owned by non-vertically integrated cable programmers pursuant to Section 628 is significant. It has prompted BellSouth to propose, in an April 18, 1997 letter to Senator John McCain (R-AZ), that the program access rules be extended to cover non-vertically integrated cable programmers. Ameritech supports that proposal and urges the Commission and Congress to take the action necessary to implement it.

b. Non-Satellite Delivered Programming.

Currently, Section 628 does not apply to non-satellite delivered cable programming. Thus, for example, cable programming delivered by fiber optic wire would be exempt from the protection conferred by Section 628. As fiber-optic technology improves, costs continue to drop, and cable operators increasingly cluster their systems the efficiency of terrestrial distribution of programming makes it increasingly attractive for vertically-integrated programmers to switch to such a delivery scheme and circumvent Section 628. The Commission has already expressed a willingness to address this issue in the appropriate circumstances.[23/]

23/ Third Annual Report at note 440.

The Commission should not wait to act until there is a wholesale circumvention of Section 628 effectuated by switching to fiber optic delivery of programming. For example, Cablevision, which has substantial interests in numerous regional sports networks in New York, is reportedly delivering or seriously contemplating delivering programming in New York by using fiber-optic wiring as opposed to traditional satellite.[24/] In addition, it is reported that New York One News Channel, owned by Time Warner, is being delivered via fiber and thus would not be covered by the program access rules.[25/]

There is absolutely no tenable policy justification for permitting evasion of the essential procompetitive protection of Section 628 simply because the vertically integrated cable company has changed the means of delivering programming. The technology used for delivery is irrelevant to the anticompetitive conduct at issue. Congress or the Commission should swiftly close this potentially significant loophole by extending Section 628 to cable programming delivered by whatever means.

c. Discrimination Against Wireline Competitors To Incumbent Cable Operators.

There appear to be instances of discrimination developing against wireline companies as compared to other MVPDs, such as DBS. As telephone companies are the strongest potential

---

24/ See Geraldine Fabrikant, As Wall Street Grows, A Cable Dynasty Grows, N.Y. Times, April 27, 1997, at Financial p. 1, appended hereto as Attachment 6.

25/ See Second Amended Complaint filed in Bartholdi Cable Company, Inc. v. Time Warner, Inc., at ¶ 92.

competitors to traditional cable, as opposed to other MVPDs such as DBS, which do not have a local presence and do not provide local broadcast programming, such disparate treatment raises serious competitive concerns.

For example, it is Ameritech's belief that Rainbow, Cablevision's affiliated programmer, had imposed discriminatory rate structures and marketing requirements only on overbuilders providing cable service.[26/] Such targeted discriminatory attacks against wireline service providers must be addressed head on by the FCC if competition is to flourish in the video market.

2. Shortcomings In The Commission's Rules For Processing Complaints And Providing Remedies For Section 628 Violations.

On May 16, 1997, Ameritech filed a Petition for Rulemaking to address three major shortcomings in the Commission's processes for handling Section 628 complaints and remedying violations. The Commission put the Petition out for public comment, and the pleading cycle was closed on July 17, 1997. Ameritech summarizes here the concerns addressed by that Petition because they have significant bearing on the state of competition in the MVPD marketplace.

a. The Commission Fails To Handle Program Access Complaints In An Expeditious Fashion As Required By Law.

26/ See, Declaration of Louis M. Scharfberg, Director of Programming for Ameritech, attached to the program access complaint filed by Ameritech and Americast against Rainbow, Ameritech/Americast v. Rainbow Holdings Company, Inc., CSR 4873-P (filed Dec. 6, 1996).

In response to the clear Congressional mandate that "the Commission's regulations shall - (1) provide for an expedited review of any complaint pursuant to [Section 628],"[27] the Commission created a complaint process that fails to include a timeframe within which it is required to decide Section 628 cases.[28] Such a decision not to implement a firm deadline for decision has resulted in a disappointingly protracted decision-making timeframe that translates into harm to prospective competitors and to competition itself.

The average length of time it takes the FCC to render a decision on a Section 628 complaint appears to be approximately one year. The longest time it has taken the FCC to decide a Section 628 complaint was over thirty-two months,[29] while the

---

27/ 1992 Cable Act § 628(f)(1); 47 U.S.C. § 548(f)(1).

28/ The FCC adopted a system promoting resolution of § 628 complaints on the basis of a complaint, answer, and reply. The rules create a fifty-day pleading cycle: the aggrieved complainant must provide notice to the defendant programming vendor or cable operator of intent to file a complaint at least 10 days notice prior to filing a complaint; file complaint; defendant programming vendor or cable operator has 30 days to file an answer; the complainant has 20 days to file a reply pleading. The pleading cycle is then closed and the staff reviews the pleadings. Discovery is not a matter of right. Rather, it is determined on a case-by-case basis. The Commission may request additional briefs. In such circumstances, reply briefs must be filed within 20 days thereafter. The staff then rules on the merits. Implementation of §§ 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 (Development of Competition and Diversity in Video Programming Distribution and Carriage), 8 FCC Rcd 3359 (1993) (First Report and Order in MM Doc. No. 92-265) (hereinafter "Program Access Order").

29/ American Cable Company v. Telecable of Columbus, Inc., 11 FCC Rcd 10090 (1996) Memorandum Opinion and Order in CSR-4206; (continued...)